In the Supreme Court

of the United States

THE MARTIN BROTHERS BOX COMPANY, a corporation,

Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION and SOUTHERN PACIFIC COMPANY, a corporation,

Respondents.

REPLY BRIEF

By the device of mislabeling the conclusions of the Commission into "findings of fact made by the Interstate Commerce Commission in its report" the respondent railroad carrier (Brief 1) endeavors to distort the question presented by the petition in this case, and to make it appear as though a question of fact were presented or involved. The Commission likewise in its brief indulges in the same contortion.

But, as Judge Pope stated in the court below:

> "this is a case in which all of the evidence, both that of the complainant and that of the carrier, shows with certainty that there was an unlawful preference and unreasonable prejudice and disad-

> vantage to the complainant within the meaning of the Act. There was no evidence whatever to the contrary."

The only findings referred to by the respondent carrier and by the Commission consist of the conclusion of the Commission, under the heading "Conclusions" in its report, that complainant had failed to establish that the carrier engaged in any unreasonable or otherwise unlawful practice or subjected complainant to any undue prejudice.

The respondent carrier, "regarding as determinations of fact" these conclusions of the Commission, parades again in its brief the contentions and bits of evidence originally presented to the Examiner and again presented to the Commission and again to the trial court and again to the Court of Appeals. None of these persons or tribunals was impressed by the parade. The case did not and cannot be made to turn upon the factual situation.

The appendix hereto summarizes the situation in respect of the facts.

Two vital considerations are presented by the petition.

DISCRIMINATION AMONG NON-COMPETING SHIPPERS

Of tremendous importance as concerns transportation by rail in the United States is the consideration of the requirement of substantial equality of treatment of interstate shippers who may not be competitors inter

sese. As to this, the carrier, for the first time in this Court (Brief 6) says,

> "We unequivocally state that in this brief we place no reliance on any showing of a lack of competitive relationship between petitioner and other shippers as supporting the Commission decision."

But when the Examiner held against the carrier on the merits of the case and recommended an award of reparations, the carrier took exceptions (10 and 12—R. 17) and, arguing the exceptions before the Commission, claimed error in the failure of the Examiner to find a lack of competitive relationship between the complainant and other shippers receiving more favorable treatment. This exception brought forth a finding by the Commission that,

> "The complainant has not established that any of its competitors was unduly preferred by the practices of the defendant here assailed." (R. 121)

Then, when the matter was presented to the trial court, Judge Solomon noted that the Commission's attorneys in their brief filed with him, referred to the lack of competitive conditions among shippers and "found some connection between such statement and the Commission's conclusions that no competitor of plaintiff was unduly preferred." (R. 68)

And when the Commission and the carrier were seeking to reverse Judge Solomon's decision, the Commission argued to the Court of Appeals that the record "also fails to show that appellee was subjected to competition since it produced only wire bound boxes and was not engaged in the sale of lumber as such. In the

absence of proof of competition an allegation of undue prejudice and preference cannot be sustained." (R. 863, Petition Appendix 17-18)

We thus see the railroad arguing to the Commission that proof must be made of competition between favored shippers and shippers discriminated against; and we see the Commission in its report finding that,

> "the complainant has not established that any of its competitors was unduly preferred by the practices of the defendant"

(and dismissing the petitioner's complaint in the face of its finding that an aggravated discrimination had been practiced); and we find the Commission, both before the District Court and before the Court of Appeals, urging the proposition that in the absence of proof of competition the allegations of undue prejudice and preference cannot be sustained.

With this record one Judge, of the four participating in the two courts, says in a foot note that the Commission's report affords no basis for an argument that there could be no violation of the Act unless undue preference was extended to competitors of the complaining shipper.

We think there is no doubt whatever in this record but that the Commission proceeded, as requested by the carrier, to deny relief because no competition between shippers was alleged and proved. And we think that this raises an important question of law which has not been but should be decided by this Court. In the words of Judge Pope (R. 863-864, Petition Appendix 24),

> "Even if there were doubt as to whether the Commission was proceeding upon the theory that the complainant must be denied relief in the absence of proof of competition, yet the very existence of the doubt would alone and without more require a reversal of its order because of the inadequacy and lack of clarity of the record. See Eastern-Central Assn. v. U. S., 321 U.S. 194, 210; U. S. vs. Chicago, M., St. P. & P. R. Co., 294 U.S. 499, 511."

REPARATIONS

Incidentally, a ground for dismissal of complainant's petition before the Commission was, in the language of the report,

> "the evidence presented falls far short of the requirements in a proceedings of this character to support an award of reparation." (R. 126)

Upon this conclusion also the complaint was dismissed. To the extent that the dismissal was premised upon this conclusion the Commission was likewise in error, as was found by the District Court Judge and by two of the three Judges in the Court of Appeals.

STATUTORY VIOLATIONS

Neither the Commission nor the District Court nor the Court of Appeals decided this matter upon any controverted question of fact as the briefs of the carrier and of the Commission would lead this Court to believe.

As a basis for decision Judge Healy, in the first of the prevailing opinions in the court below, says (R. 847-

848, Petition Appendix 2-3), that the Commission in its report made an "ultimate finding" that "complainant has failed to establish that [Southern Pacific] during the complaint period engaged in any unreasonable or otherwise unlawful practice, as alleged, in violation of Section 1 of the Act in furnishing or not furnishing cars to complainant, . . . or that [Southern Pacific] subjected complainant to any undue prejudice in violation of Section 3."

Then after "noticing the narrow scope of judicial review" of orders of the Commission, the Judge expresses the opinion,

> "It appears from the trial court's decision that it regarded the conclusions of the Commission, quoted above, as conclusions of law rather than as findings of ultimate fact. Such approach is erroneous." (R. 849, Petition Appendix 4-5)

Thus, there is squarely raised the question of the conflict of the opinion of Judge Healy with the decision of this Court in Florida East Coast Line vs. U. S., 234 U.S. 167, 185, and with the decision of the Court of Appeals for the District of Columbia in U. S. vs. I. C. C., 198 F. 2d 958, where it is held that the question identical with the one here involved presents not an issue of fact, or "ultimate fact", but one of law which it is the duty of the courts to examine and decide.

The other opinion in the Court of Appeals, that of Judge Chambers, is that there had been practiced "an unfair discrimination by Southern Pacific Company" (R. 854, Petition Appendix 11) and that the Examiner should be upheld and the Commission should be re-

versed, but that the court below and the Court of Appeals did not have "latitude" to rectify this injustice or to correct the error of the Commission.

In the third opinion Judge Pope correctly states (R. 856-857, Petition Appendix 14-15), "that not only the evidence of the complainant but that of the carrier as well, shows an unlawful preference and unreasonable prejudice and disadvantage within the meaning of the Act", and that in reaching its conclusion the Commission "rode too hard upon the word 'unduly' and based such conclusion not upon any findings of fact but upon a misreading and misinterpretation of the statutory provision [Section 3(1)] just aluded to."

Unless an administrative tribunal is to be the final and exclusive interpreter of the Act of Congress and is to be the final authority on statutory construction, the majority of the court below must be reversed.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX

THE FACTUAL SITUATION

The Interstate Commerce Commission in its report made certain findings of fact. No contention is made that these facts found by the Commission were not in all respects based upon and supported by substantial evidence in the record.

The Commission found that during the period involved petitioner was furnished 593 cars. This is an adjusted figure to reflect the regulations of a service order of the Commission which permitted the use of two to three refrigerator cars in place of one box car (R. 113). This was an average of about 3.1 cars per working day.

The petitioner required and requested a minimum of 150 cars per month and had cars been supplied would have used 8.4 cars per day (R. 110-111; R. 122).

The carrier furnished an over all average of 80 percent of cars ordered on all divisions, including the Portland Division (R. 507-508; R. 797). At Portland and elsewhere, where the carrier had competition, no difficulty was experienced in obtaining cars from the carrier (R. 115-116).

In this Court the respondent carrier ignores these facts so found, and relies solely upon one of the conclusions reached by the Commission, which conclusion is not reconcilable with the facts found.

Bolstering its position as to this indefensible conclusion the respondent carrier makes certain contentions:

1. Petitioner's comparison of the furnishing to other shippers of eighty percent or more of the cars required, and the furnishing to petitioner of only thirty percent of the cars required, is said to be "fatally defective" since *written* orders of petitioner (not in the record, but referred to in certain exhibits) covered less than the number of cars supplied petitioner.

As to this contention, this respondent admits (Brief 11), "there was no requirement that car orders had to be in writing", and the Commission concedes (Brief 5) that petitioner "placed both written and oral orders", and the Commission found (R. 119) that petitioner indicated it wanted more cars than were furnished and that the written car order blanks were nothing more than a written confirmation, for the carrier, that petitioner wanted cars already assigned to it. Further, the Commission found (R. 125) that petitioner required and attempted to secure additional cars from the carrier.

2. The carrier next endeavors to make a showing that a large number of cars was held on petitioner's siding for unreasonable times, in fact claims (Brief 12) that 200 cars were held for from three to eight days. The Commission as to this matter found (R. 120) that one car was on hand 7 days, 2 on hand 6 days, 11 on hand 5 days, 22 on hand 4 days, and 56 on hand 3 days, and that many of these cars were of restricted destination. The trial court pointed out that according to the carrier's own exhibit when a car was held for more than three days from 13 to 23 other cars were moved in, loaded and moved out under load (R. 72).

3. The carrier endeavors to show that the petitioner canceled some of its orders for cars. The Commission made no such finding, and neither does the record justify such a finding. The record shows that at the hearing before the Examiner the carrier had a batch of car order blanks, not placed in the record, and that months after the occurrences complained of agents of the carrier had made various notations on these blanks, including presumably notations of cancellation (R. 586). The Commission states in its brief (page 4) that the petitioner required and needed a considerable number of cars in excess of those Southern Pacific was able to furnish. The Commission in the report it now attacks found and determined "that complainant desired, required, and attempted to secure additional cars from defendant;".

CERTIFICATE OF SERVICE

I hereby certify that I have this 9th day of September, 1955, served the foregoing reply brief upon counsel for respondents by mailing by first class air mail, postage fully prepaid, a copy thereof to each of the following: The Solicitor General of the United States, Department of Justice, Washington 25 D. C.; Samuel R. Howell, Associate General Counsel for Interstate Commerce Commission, Interstate Commerce Commission, Washington 25 D. C.; William L. Harrison, Interstate Commerce Commission, Flood Building, San Francisco 2, California; and James E. Lyons and Charles W. Burkett, Jr., 65 Market Street, San Francisco 5, California; and by mailing by first class mail, postage fully prepaid a copy thereof to James C. Dezendorf and George B. Campbell, 800 Pacific Building, Portland 4, Oregon.

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Irving Rand
Of Attorneys for Petitioner